Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1996

DENNIS HARKER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA;
INTERNAL REVENUE SERVICE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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42 pp

## QUESTION PRESENTED

Whether potential discharge of Respondent's claim for income taxes in proceedings under chapter 13 of the Bankruptcy Code, where such claim is not dischargeable under chapter 7 thereof, justifies a finding of bad faith filing by Petitioner and dismissal of his case.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Dennis Harker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. The Court of Appeals failed to address the issue presented by the opinions of both the Bankruptcy Court at trial and the District Court on intermediate appeal. Both of those courts concluded the totality of the circumstances here justified dismissal of Petitioner's chapter 13 petition for bad faith. In so doing both concluded that a factor to be considered is the treatment of Respondent's claim for income taxes determined by the Tax Court but not assessed at time of filing in chapter 13, subject to discharge if the plan is confirmed, as opposed to chapter 7, where an exception to discharge may apply. The effect of the Court of Appeals opinion is that such disparate treatment of Respondent's claim is either a factor to be considered in determining bad faith under 11 U.S.C. Sec. 1307(c), or is sufficient itself to constitute the bad faith thereunder. The Court of Appeals in so doing also found by default that filing a chapter 13 petition with intent to avoid posting of a supersedeas bond is *per se* bad faith. The effect of both conclusions, regarding discharge availability and posting of bond, is contrary to law in other circuits.

## OPINIONS BELOW

The Bankruptcy Court of the United States District Court for the Southern District of Iowa granted Respondent's motion to dismiss Petitioner's chapter 13 bankruptcy case by order filed June 14, 1996. It is attached as Appendix A to this petition. The United States District Court for the Southern District of Iowa affirmed on appeal on September 6, 1996. That opinion is attached to this petition as Appendix B. The opinion of the United States Court of Appeals for the Eighth Circuit, dated April 25, 1997, unpublished and rendered without argument, appears in Appendix C to this petition. It was confirmed following petition for rehearing by memorandum opinion dated June 20, 1997, attached to this petition as Appendix D.

## JURISDICTION

The Bankruptcy Court for the United States District Court for the Southern District of Iowa entered judgment against petitioner on June 14, 1996. The bankruptcy court exercised jurisdiction under 28 U.S.C. Sec. 1334, and referral pursuant to 28 U.S.C. Sec. 157 and 28 U.S.C. 157(b)(2)(A) and (L) as a core proceeding. The United States District Court for the Southern District of Iowa exercised appellate jurisdiction pursuant to 28 U.S.C. Sec. 158. The United States Court of Appeals for the Eighth Circuit issued its opinion on June 20, 1997. The Court of Appeals exercised jurisdiction under 18 U.S.C. Sec. 1291.

The United States Supreme Court's jurisdiction is invoked under Title 28, U.S.C. Sec 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 11 U.S.C. Sec. 523(a) is set forth in Appendix E.

Title 11 U.S.C. Sec. 727(a) and (b) is set forth in Appendix F.

Title 11 U.S.C. Sec. 1328(a) is set forth in Appendix G.

## STATEMENT OF THE CASE

Respondent determined that various amounts of tax were due from Petitioner and his wife for taxable years 1985, 1986, and 1987. Following petition for relief in the Tax Court, that Court issued a decision on May 1, 1995. Petitioner filed for relief pursuant to chapter 13 of Title 11 on May 16, 1995. On June 23, 1995 the chapter 13 Trustee filed motion to dismiss regarding eligibility issues in the petition under 11 U.S.C. Sec. 109(e) as filed. On July 26, 1995 Petitioner filed notice of appeal of the Tax Court decision. Thereafter, Petitioner amended his schedules with respect to Respondent's claim, and the Respondent joined in the motion to dismiss September 12, 1995, adding bad faith under 11 U.S.C. Sec. 1307(c) to the grounds stated by the chapter 13 Trustee. A hearing was held on the pending motion at which only the chapter 13 Trustee's four exhibits were admitted. No testimony was taken, and no evidence was offered by the Respondent with respect to the bad faith issue or any other issue. The

matter was taken under advisement by the Bankruptcy Court. Briefs were submitted by the parties on September 25, 1995 and October 2, 1995. Petitioner filed for modification of the automatic stay of 11 U.S.C. Sec. 362 to make clear his right to pursue the Eighth Circuit appeal on January 25, 1996, and the relief requested was granted February 9, 1996 by the Bankruptcy Court. Decision was rendered by the Eighth Circuit on the tax case on May 3, 1996. The Bankruptcy Court did not rule on the motion to dismiss until June 14, 1996. He granted the motion to dismiss on grounds that the chapter 13 filing was a litigation tactic used to avoid posting a supersedeas bond for the tax appeal to the Eighth Circuit and that Respondent as an unsecured creditor (unsecured because it had failed to assess the taxes the Tax Court found due) was subject to discharge of its claim in chapter 13, but not in chapter 7, and that so using chapter 13 is inconsistent with the spirit of the Bankruptcy Code and therefore bad faith. The Bankruptcy Court's decision was upheld on intermediate appeal to the District Court, which cited only the litigation tactic of no supersedeas bond. Subsequent decision by the Eighth Circuit, without argument and unpublished, affirmed both courts below, citing its precedent that chapter 13 petitions may be dismissed under 11 U.S.C. Sec. 1307(c) for cause. It further determined that the Bankruptcy Court's finding of a litigation tactic to avoid a supersedeas bond and use of chapter 13's discharge language to potentially discharge Respondent's claim as bad faith was not clearly erroneous.

## REASONS FOR GRANTING THE WRIT

### I. USE OF CHAPTER 13 DISCHARGE PROVISIONS AS BAD FAITH

This record is clear. Petitioner filed under chapter 13 of the Bankruptcy Code to obtain relief expressly granted by it, including the express and unambiguous discharge language of 11 U.S.C. Sec. 1328(a), which is as clearly not subject to the exception to discharge language of 11 U.S.C. Sec. 523(a). The courts below, without any evidence to support such a conclusion, or any law, determined that Congress did not mean what it plainly said, and Petitioner acted in bad faith *per se* by following the statutes. This conclusion is not changed by the additional factor of avoidance of posting of an appeal bond, as noted below in subpart C(iii), because that ground for a determination of bad faith has not been held by any court to be sufficient for that purpose standing alone. If the avoidance of discharge prong fails, the entire logic and foundation of the dismissal fail.

#### A. Background.

At the hearing on the motion to dismiss joined by the Respondent, no evidence was offered other than the four exhibits originally filed by the chapter 13 Trustee:

Schedule E of the bankruptcy schedules filed May 16, 1995
Amended Schedule E filed July 14, 1995
U.S. Tax Court opinion dated December 1, 1994
U.S. Tax Court decision dated May 1, 1995

No other evidence was offered by Respondent or anyone else, although after the Bankruptcy Judge

expressed concern about the motive for filing the case, the Petitioner's offer of his own testimony was rejected by the Court with a clear reference that he wouldn't believe it anyway:

| | |
|---|---|
| COUNSEL FOR DEBTOR: | Your honor, my client stated to me that his reason for filing this was to have an ability to protect his homestead. I'd like that statement to be considered to be evidence in this case. |
| THE COURT: | Whether the Court believes it or not is something else, Counsel. |
| COUNSEL FOR DEBTOR: | I understand. Is that statement received then? |
| THE COURT: | I'll take that statement as a professional statement to the Court, Counsel. |

In his ruling on the pending motions, the Bankruptcy Judge determined "this Chapter 13 petition was filed in bad faith and is subject to dismissal or conversion for cause pursuant to Sec. 1307(c)." He also gave Petitioner 20 days from the date of his order to convert the case to another chapter of the Code. If he had converted to either chapter 7 or 11, the automatic stay of 11 U.S.C. Sec. 362

would still have been in effect, another example of the illogic of the purported separate ground for a bad faith filing, the issue of filing a bond. The bond matter was moot at the time of decision, the appeal having been decided, and even if it hadn't been, conversion would have resulted in no change of circumstances. In reaching its decision the Eighth Circuit Court cited cases which support a contrary result in this case, and overlooked its own cases with the same effect. The Court principally relied upon *Molitor v. Eidson*, 76 F.3d 218, 220 (8th Cir. 1996) for the proposition a chapter 13 petition may be dismissed under 11 U.S.C. Sec. 1307(c), not really in dispute. It thereafter recites three factors: the litigation tactic matter, the Respondent was the only unsecured creditor, and the nondischargeability issue. *Molitor* involved repeated filings (three), hearings, and dismissals undertaken to frustrate an opposing litigant, and lists three factors to consider in the bad faith analysis: (1) whether debts and expenses are stated accurately, (2) whether any fraudulent representation was made to mislead the court, (3) whether the debtor unfairly manipulated the bankruptcy code. None of those are present here, unless you conclude that reliance on the express rights granted by Congress is *per se* manipulation. *In re Lemaire*, 898 F.2d 1346 (8th Cir. 1990) is also cited in support of its conclusion. A bitterly divided *en banc* Court found a chapter 13 plan to be proposed in bad faith, and not subject to confirmation, where it proposed to discharge a civil judgment awarded to the victim of debtor's intentional shooting (*i.e.*, murder). The case of *Noreen v. Slattengren*, 974 F.2d 75, 77 (8th Cir. 1992), also cited, involved confirmation of a chapter 13 plan, with an attendant hearing. This

Petitioner never had an opportunity to have the plan he proposed evaluated under 11 U.S.C. Sec. 1325, which plan proposed to pay the Respondent in full. The Eighth Circuit chose not to cite its most exhaustive treatment of the issue in this case, albeit again in context of chapter 13 plan confirmation, *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982). Eleven factors are listed as nonexclusive matters to be addressed when determining good faith of a chapter 13 plan itself. No opportunity was given this Petitioner to develop any record with respect to those issues or any others before the entire case was dismissed.

**B. Petitioner and the Conflict in the Circuits.**

The ruling of the Court of Appeals on this issue is in direct conflict with that of the Third and Seventh Circuit Courts of Appeal. *In re Lilley*, 91 F.3d 491, 495 (3d Cir. 1996), and *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Both courts require a fact intensive inquiry to support a dismissal of a chapter 13 petition for bad faith, and the burden is on the creditor to develop those facts as a matter of record. *Love*, 957 F.3d at 1355, *Lilley*, 91 F.3d at 496. The Eighth Circuit made its decision with no inquiry whatsoever on the record, exacerbated by the Bankruptcy Court's obvious distaste for the statutory scheme of discharge chosen by Congress. There is now a Circuit split on this issue which this Court can resolve by grant of this writ of certiorari, and in the process clarify an important issue in construction of the plain language of Congress in exercising its Constitutional power to establish the uniform fabric of the bankruptcy and insolvency laws. U.S. Const. art. I, Sec. 8.

At the very heart of the matter is the Bankruptcy Court's conclusion that Petitioner's attempt to use the express discharge provisions of a chapter 13 reorganization is transformed to bad faith warranting dismissal because Respondent is unsecured (it is so only because it did not assess before the case was filed, which it had two weeks to do), and as a result the exception to discharge provisions of 11 U.S.C. do not apply as they otherwise would in a chapter 7 case. Instead the clear language of 11 U.S.C. Sec. 1328(a) grants Petitioner a discharge if his chapter 13 plan is confirmed and he performs under its terms. As a result of the holding here, Congress' clear intent is frustrated, and Petitioner has had no opportunity to either offer a chapter 13 plan or perform it.

### C. Petitioner's Position on the Conflict.

#### i. Position Which Avoids Conflict.

The ruling of the Eighth Circuit Court of Appeals has unnecessarily created a conflict between the circuits on a record devoid of any facts to support the ruling creating the conflict. No facts were developed at trial. Much discussion was had on the record, all argument by attorneys and no evidence, concerning the issues of whether the Respondent's claim was disputed and liquidated within the context of 11 U.S.C. Sec. 109(e). Most of the record made related to the real issue raised by the original movant, the chapter 13 Trustee, *i.e.*, was the Petitioner eligible to file for chapter 13 relief under 11 U.S.C. Sec. 109(e)? None of the facts necessary for that determination were developed, and await remand from this Court. Real issues exist in this case with respect to unassessed tax

penalties and interest, as opposed to taxes themselves, and the application of such cases to the "noncontingent, liquidated" requirement of 11 U.S.C. Sec. 109(e) unsecured debt measuring chapter 13 eligibility. The "notice and demand requirement of 26 U.S.C. Sec. 6601(e)(2)(A) cannot be met until interest and penalties have been assessed, *Resyn Corp. v. U.S.*, 851 F.2d 660 (3d Cir. 1988). Another issue undetermined by the Bankruptcy Judge in the course of rush to judgment on the dismissal is whether claims subject to appeal at date of filing and disputed are contingent within 11 U.S.C Sec. 109(e) or are they "disputed" for purposes of determining eligibility thereunder. No hearing was held, so no determination of eligibility has been or can be made. The holdings in *In re King*, 9 B.R. 376 (Bkrtcy.D.Ore. 1981) and *In re Lambert*, 43 B.R. 913 (Bkrtcy.D.Utah 1984) if followed would eliminate the Respondent's penalty and interest claims from the eligibility calculus and the Petitioner would clearly be eligible. The contrary line of cases, *In re Sylvester*, 19 B.R. 671 (9th Cir. BAP 1982) and *In re Loya*, 123 B.R. 338 (9th Cir. BAP 1991) for example, require that a hearing be held to liquidate the claim at issue. Upon reversal of the judgment of dismissal much remains to be done, the first order of business being determination of whether the Respondent still has any claim at all, no proof thereof having been timely filed. See *In re Rimgale*, 669 F.2d 426, 427 (7th Cir. 1982) ("Because we cannot endorse either the district judge's construction of the statute or the bankruptcy judge's cursory inquiry into the debtor's good faith in proposing the plan, we remand for additional proceedings in the bankruptcy court").

### ii. Deference to Congress.

It seems fairly obvious that federal courts should defer to Congress when it does its job, however well that may be done. Apparently not. Congress has jurisdiction of this subject matter under U.S. Const. art. I. This Court has consistently and often stated the bedrock proposition that when Congress unambiguously declares its intention, courts federal or otherwise have no business rewriting the effect of that language. Most recently in *Lind v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059 (1997) this Court employed very sophisticated analysis to the habeas corpus amendments of the Antiterrorism and Effective Death Penalty Act in determining the effect of Congress' silence concerning retroactivity of chapter 153 amending existing sections of the habeas statute, vice the explicitly retroactive effect of the provisions added by chapter 154. Such sophistication is not required here. Another case in the last term, *Arkansas v. Farm Credit Services of Cent. Arkansas*, ___ U.S. ___, 117 S.Ct. 1776 (1997), in context of the Tax Injunction Act, articulated the obvious proposition that statutory language must be enforced according to its terms. 11 U.S.C. Sec. 523(a), directly applicable to Respondent's claim, in great detail lays out the sections to which its exception to discharge language applies, *i.e.*, 727, 1141, 1228(a), 1228(b), and 1328(b). There is a 11 U.S.C. Sec. 1328(a) which awards a discharge to a chapter debtor who performs under a confirmed plan of reorganization and it is *not* included, but rather is specifically excluded, from the language of 11 U.S.C. Sec. 523(a). The statutory analysis here is far from sophisticated. It couldn't be more straightforward.

Congress was given an opportunity to change the law to afford the relief Respondent urges. S. 445, 98th Cong. Sec. 221 proposed an amendment to 11 U.S.C. Sec. 1328(a)(2) to disallow discharge of chapter 7 non-dischargeable debt in a chapter 13 plan. It did not become law. See also 5 *Collier on Bankruptcy* Sec. 1325.04[3], at 1325-20, n. 44 (15th Ed. 1966). In addition every court that has addressed the issue here – whether reliance upon the plain language of 11 U.S.C. Secs. 1328(a) and 523(a)(1) constitutes *per se* bad faith in filing of a chapter 13 petition – has unanimously concluded no. Some explicitly cite the proposition that Congress decides these issues, and others the logical inconsistency of a contrary conclusion given the purpose of the bankruptcy and reorganization laws. See *In re Rimgale*, 669 F.2d 426, 428 (7th Cir. 1982) (purpose of a broader chapter 13 discharge is to provide debtors incentive to pay something, rather than nothing); *In re Adamu*, 82 B.R. 128, 130 (Bkrtcy.D.Ore. 1988) (contrary conclusion "makes as much sense as saying that a taxpayer acts in bad faith when he claims a lawful deduction on his income tax return"); *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996) ("It is wholly implausible that Congress would hold the type of conduct in which Mr. Lilley admittedly engaged is so egregious to warrant dismissal of his petition but benign enough that the debt incurred as a result of this conduct would be dischargeable if no effort to dismiss his petition were made."). The best summary of the legislative development of chapter 13 and its prophylactic purpose is found at *In re Lee*, 71 B.R. 833, 845 (Bkrtcy.N.D.Ga. 1987):

> Congress enacted Chapter 13 to provide an effective system for dealing with consumer

> bankruptcies and to encourage debtors to attempt to repay their debts under the supervision of the bankruptcy courts. As a further incentive Congress expanded the scope of the discharge to be granted upon successful completion of the plan [ftn 4 – This expansion of the discharge provision, as compared with Chapter 7, is demonstrated by the fact that debts obtained through conduct involving fraud or dishonesty may be discharged in an appropriate Chapter 13 case, though not in a liquidation bankruptcy.] because a Chapter 13 repayment plan requires a greater commitment from the debtor, including future income, Congress provided the broader discharge to encourage debtors to choose this chapter rather than straight liquidation. (Citations omitted)

### iii. Effect of Deferring to Congress.

If the Bankruptcy Court, the District Court and Court of Appeals were wrong in concluding Congress should not have legislated as it did, the only remaining ground for dismissal of the Petitioner's chapter 13 petition is the "litigation tactic" of filing to avoid posting a supersedeas bond. No court has held that is bad faith without a great deal more indicia of bad faith, whether chapter 13, 11 or 7 is at issue. All of the cases cited by the Respondent in its briefing below involve factual development of debtor misconduct in addition to the posting of bond. See for example, *In re Roberts*, 117 B.R. 677 (Bkrtcy.N.D.Okl. 1990) (failure to disclose six separate assets in debtor's petition, failure to report supplemental income, and pre-petition payments); *In re Ramji*, 166 B.R. 288 (Bkrtcy.S.D.Tex. 1993) (transfer of property to family, members, ability to pay

creditors in full, low estimate of income on schedules); *Matter of Meisner*, 155 B.R. 519 (Bkrtcy.D.Neb. 1993) (solvent debtor, able to pay tax claims, schedules failed to disclose fraudulent transfer to family, insider payments within a year, misuse of pre-petition royalty receivable post petition); *In re Simmons*, 149 B.R. 586 (Bkrtcy.W.D.Mo. 1993) (inaccurate listing of income, debts and expenses, three multiple filings of the same). Respondent also relied on *In re Boynton*, 184 B.R. 580 (Bkrtcy.S.D.Cal. 1995), in the first instance a chapter 11 case. The bad faith filing conclusion was reached in context of a debtor who was shown to have $5,000,000 in liquid funds in a brokerage account, and a very detailed factual record was developed before a finding was reached. The circuit opinion in *U.S. v. Verdunn*, 89 F.3d 799 (11th Cir. 1996) relied upon by Respondent dealt only with matters of 11 U.S.C. Sec. 109(e) eligibility which this Bankruptcy Court did not reach. It did not disturb the conclusions of both the bankruptcy court and the district court that potential nondischargeability in chapter 7 (Respondent was a party there also, with tax fraud issues) is a limited factor in determining the good faith issue, but cannot itself constitute bad faith. See respectively *Matter of Verdunn*, 160 B.R. 682, 687 (Bkrtcy.M.D.Fla. 1993) and *U.S. v. Verdunn*, 187 B.R. 996, 1003 (M.D.Fla. 1995).

This Court should grant this petition, and remand to the Bankruptcy Court for determination of outstanding issues concerning the nature of Respondent's claim within the meaning of 11 U.S.C. Sec. 109(e), and if Petitioner is eligible to file, resolve any issues with respect to confirmation of Petitioner's chapter 13 plan.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Respectfully submitted,

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No. _____

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APPENDIX

TO

PETITION FOR WRIT OF CERTIORARI

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## APPENDIX A

## UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF IOWA

| | | |
|---|---|---|
| **In the Matter of** | : | **Case No. 95-1417-CH** |
| **DENNIS W. HARKER,** | : | **Chapter 13** |
| | : | |
| **Debtor.** | : | |

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## ORDER-MOTION TO DISMISS AND CONFIRMATION OF PLAN

(Filed Jun. 14, 1996)

On September 18, 1995, hearing was held on the Confirmation of Chapter 13 Plan and the Motion to Dismiss case filed by the Chapter 13 Trustee and joined in on by the United States of America. Debtor, Dennis Harker, was represented by his attorney, Jerrold Wanek. Kevin R. Query and Mary Ann Waters were present for the creditor, USA. Creditor, Earlham Savings Bank, was represented by its attorney, Donald F. Neiman. Elizabeth E. Goodman appeared for the Chapter 13 Trustee. At the conclusion of the hearing, the court took this matter under advisement upon a briefing schedule. Briefs have been filed in the case and the court now considers this matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L). The court now enters its findings of facts and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

## FINDINGS OF FACT

1. Debtor, Dennis Harker, was formerly an agent with the Drug Enforcement Administration. In 1989, criminal charges of tax evasion were brought against Debtor and his then wife, Mary A. Harker. Debtor pled guilty to a charge of evasion for the year of 1987 and Mary Harker pled guilty to a charge of evasion for 1985.

2. The Internal Revenue Service (IRS) determined that the Harkers were liable for deficiencies in tax, as well as additions to tax for fraud and financial understatement for the taxable years 1985, 1986, and 1987. The statutory deficiency was issued to the Harkers who filed a petition with the United States Tax Court.

3. In December 1994, the Tax Court issued its opinion sustaining the determinations of the IRS. On May 1, 1995, the Tax Court entered its decision which set forth the amount of deficiencies and additions to tax that were to be assessed against the Harkers.

4. Debtor filed his petition for bankruptcy relief under Chapter 13 of the U.S. Bankruptcy Code on May 16, 1995. The IRS had not yet made assessments in accordance with the Tax Court decision or filed notices of federal tax liens.

5. The bankruptcy schedules listed one secured creditor, Earlham Savings Bank, who was listed as holding a secured claim in the amount of $32,884.09.

6. The bankruptcy schedules also listed one creditor holding an unsecured priority claim. This creditor was listed as the IRS with a claim in the amount of

$785,855.60. The schedule stated that the claim is "fixed and liquidated."

7. On June 1, 1995, Debtor filed a Chapter 13 Plan.

8. The IRS objected to confirmation of Debtor's Chapter 13 Plan. The creditor Earlham Savings Bank, also objected to the Chapter 13 Plan.

9. The Chapter 13 Trustee filed a Motion to Dismiss on the grounds that Debtor did not qualify for relief under Chapter 13 of the U.S. Bankruptcy Code pursuant to 11 U.S.C. § 109(e).

10. Debtor objected to Trustee's Motion to Dismiss arguing that the original schedules had a clerical error setting forth a "fixed and liquidated" unsecured priority debt in excess of $785,000.00. Debtor also filed on July 14, 1995, an amendment to Schedule E amending his schedules to reflect that the claim held by the IRS was "contingent and unliquidated."

11. On July 26, 1995, Debtor filed an appeal of the Tax Court decision to the United states Court of Appeals for the Eighth Circuit.

12. On September 12, 1995, the IRS filed a joinder to the Trustee's Motion to Dismiss.

13. These matters came on for hearing on September 18, 1995. Upon conclusion of the hearing the court took this matter under advisement.

14. On January 25, 1996, Debtor moved to modify the automatic stay to allow oral argument in his appeal pending before the Eighth Circuit Court of Appeals. On February 9, 1996, the court found that if the automatic

stay applies in this case that the stay should be modified for cause pursuant to § 362(d)(1) to allow the appeal of the case with the IRS to go forward.

15. On May 16, 1996, the IRS filed a status report in support of their motion to dismiss. The status report stated that the Eighth Circuit Court of Appeals entered on May 3, 1996, its decision affirming the federal tax claim in this case. The decision of the Eighth Circuit Court of Appeals was attached to the report.

## DISCUSSION

### Motion To Dismiss

The Chapter 13 Trustee has filed a Motion to Dismiss this case on the grounds that Debtor is ineligible for Chapter 13 relief pursuant to 11 U.S.C. §§ 109(e) and 1307(c). The USA has joined in this motion. The movants argue that the case should be dismissed because Debtor is ineligible for Chapter 13 relief as his unsecured debt exceeds the debt limitations and because Debtor filed the petition in bad faith. The Court shall first consider the argument of bad faith.

11 U.S.C. § 1307(c) provides in relevant part as follows:

> Except as provided in subsection (e) of this section, on request of a party in interest or of the United States Trustee and after notice and hearing, the court may convert . . . or dismiss a case under this chapter . . . for cause. . . .

Although bad faith is not listed as a cause for dismissal under § 1307(c), the Eighth Circuit specifically held in a

recent decision that "a Chapter 13 petition filed in bad faith may be dismissed or converted "for cause" under 11 U.S.C. § 1307(c)." *In re Molitor*, 76 F.3d 218, 220 (8th Cir. 1996) (citations omitted). In *Molitor*, the Eighth circuit found that a bad faith determination should focus on the totality of the circumstances. *Id.* The court went on to list three specific circumstances of bad faith including:

> (1) whether the debtor has stated his debts and expenses accurately;
>
> (2) whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or
>
> (3) whether he has unfairly manipulated the bankruptcy code.

*Id.*

The following factors were also found by the Seventh Circuit to be relevant to a good faith determination under § 1307(c):

> (1) whether the debt would be nondischargeable under Chapter 7;
>
> (2) the timing of the petition;
>
> (3) how the debt arose;
>
> (4) the debtor's motives in filing the petition;
>
> (5) the treatment of creditors; or
>
> (6) whether the debtor has been forthcoming with the court and creditors.

*In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992) (citations omitted).

Despite these listing of specific circumstances, the lists were not intended to be an exhaustive list, but instead the totality of the circumstances must be determined based on the facts of the case at hand. *Id.* at 1355 (7th Cir. 1992) (citation omitted). The burden of showing lack of good faith under § 1307(c) is on the party moving for dismissal. *Id.* Courts should be more reluctant to dismiss a petition under § 1307(c) for lack of good faith that [sic] to fail to confirm a plan for lack of good faith under § 1325(a). *Id.* at 1356. However, the focus of a good faith inquiry under either § 1307(c) or § 1325(a) is whether the filing is "fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions." *Id.* at 1357.

Bankruptcy provides a federal remedy and safe harbor for poor but honest creditors by permitting reorganization of their financial affairs and a fresh start. *See Grogan v. Garner,* 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991); *In re LeMaire,* 898 F.2d 1346, 1352 (8th Cir. 1990). This means that Chapter 13 bankruptcy petitions must be filed with a sincere effort to repay creditors. *In re Schaitz,* 913 F.2d 452, 454 (7th Cir. 1990).

Several courts have found that a filing of a Chapter 11 bankruptcy petition to avoid posting an appeal bond constitutes bad faith as it is merely a litigating tactic unrelated to the legitimate goal of reorganization. *In re Boynton,* 184 B.R. 580, 583-84 (Bankr.S.D.Cal. 1995); *In re Karum Group, Inc.,* 66 B.R. 436, 438 (Bankr.W.D. Wash. 1986); *In re Smith,* 58 B.R. 448, 451, (Bankr.W.D.Ky. 1986) (citation omitted); *In re Wally Findlay Galleries (New Yor.), Inc.,* 36 B.R. 849, 851 (Bankr.S.D.N.Y. 1984); *But see In re*

*Alton Telegraph Printing Co.*, 14 B.R. 238 (Bankr.S.D.Ill. 1981) (permitting a Chapter 11 proceeding filed to avoid posting an appeal bond to go forward). The Ninth Circuit has declined to decide whether bankruptcy laws can be used to avoid the posting of an appeal bond when enforcement would result in severe business disruption. *In re Marsch*, 36 F.3d 825, 829 (9th Cir. 1994) (finding that such a debtor may not file a petition to avoid posting an appeal bond where the debtor had the financial means to pay and business was not in danger of disruption).

Other courts have applied the reasoning of these Chapter 11 cases to Chapter 13 cases and have held that the filing of a Chapter 13 petition to avoid payment of an appeal bond is indicative of bad faith. *In re Ramji*, 166 B.R. 288, 290 (Bankr.S.D.Tex. 1993); *In re Roberts*, 117 B.R. 677, 678 (Bankr.N.D.Okla. 1990). One bankruptcy court has held that a Chapter 13 petition filed by a solvent debtor as an attempt to prevent the IRS from levying on a tax lien was filed in bad faith and subject to dismissal. *In re Meisner*, 155 B.R. 519, 520 (Bankr.D.Neb. 1993); *But see In re Verdunn*, 160 B.R. 682 (Bankr.M.D.Fla. 1993) (stating that the debtors attempt to discharge tax claims which are potentially nondischargeable in a Chapter 7 is not *per se* bad faith).

In looking at the particular facts of the case at hand and taking into account a totality of the circumstances, this court finds that the Chapter 13 petition filed by Debtor was not filed in good faith and must therefore, be dismissed for cause pursuant to § 1307(c). This case was filed approximately two weeks after a Tax Court decision setting forth the amounts to be assessed against the Harkers for tax deficiencies and penalties for fraud and

financial understatements. This petition was filed before any assessment was made by the IRS. The IRS, with a claim in the amount of $785,855.60, is the only unsecured creditor listed on the bankruptcy schedules. In fact the only other creditor listed was Earlham Savings Bank holding a secured claim. Debtor did not file his appeal of the Tax Court decision until after the filing of the bankruptcy petition. No appeal bond was filed. Debtor's Chapter 13 plan proposes payments of $500.00 per month to the Trustee. The Plan also proposes that if the IRS claim is allowed that Debtor will liquidate the farmland in Boone County. Such property is listed in the schedules as having a value in the amount of $200,000.00.

The court finds that Debtor filed this Chapter 13 bankruptcy as a litigation tactic to avoid posting an appeal bond that would have been required to postpone assessment by the IRS pending appeal. Furthermore, the debt owed to the IRS, who was the only unsecured creditor listed, is potentially nondischargeable in a Chapter 7. The court finds that using Chapter 13 in such a manner is inconsistent with the spirit of the Bankruptcy Code and with the fundamental goal to reorganize debts. Such usage of Chapter 13 reorganization will not be allowed. The court finds that this Chapter 13 petition was filed in bad faith and is subject to dismissal or conversion for cause pursuant to § 1307(c).

The court has determined that this case should be dismissed or converted for cause pursuant to § 1307(c) due to the bad faith filing of the Chapter 13 petition. The court, therefore, need not reach the issue of whether Debtor's unsecured debt exceeds the debt limitations imposed by § 109(e).

Objections to Confirmation

The Chapter 13 Trustee, USA and Earlham Savings Bank have each filed Objections to the Confirmation of the Chapter 13 Plan. The court has determined that this case should be dismissed or converted for cause pursuant to § 1307(c). Therefore, the Objections to Confirmation are denied as moot.

**ORDER**

IT IS THEREFORE ORDERED that the Chapter 13 petition was not filed in good faith and is subject to dismissal or conversion for cause pursuant to § 1307(c). Debtor is given twenty days from the date of the filing of this order in which to file a Motion to Convert this case. Failure to timely file said motion shall result in this order to be self-executing and the case shall be dismissed without further notice and hearing.

IT IS FURTHER ORDERED that the Objections to Confirmation of the Chapter 13 Plan are denied as moot.

DATED this 14th day of June, 1996.

/s/ Russell J. Hill
RUSSELL J. HILL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | | |
|---|---|---|
| DENNIS HARKER,<br>Plaintiff,<br>vs.<br>UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE,<br>Defendants. | ) | No. 4-96-CV-80638<br><br>DECISION ON APPEAL<br>(Filed Sep. 6, 1996) |

On September 3, 1996, the court held hearing on the merits of this bankruptcy appeal. The appellant debtor, Dennis W. Harker, appeals the June 14, 1996 order of Bankruptcy Court Chief Judge Russell J. Hill finding that Harker's chapter 13 petition was not filed in good faith and subject to dismissal or conversion for cause pursuant to section 1307(c).

The bankruptcy court's findings of fact shall not be set aside unless clearly erroneous, but the district court has the obligation to correct errors of law. *See U.S. v. United States Gypsum co.* [sic], 333 U.S. 364, 395 (1948). The court accepts the findings of fact in the bankruptcy court's order, there being no clearly erroneous findings. The bankruptcy court correctly applied applicable law. The bankruptcy court ruling is affirmed.

A chapter 13 petition filed in bad faith may be dismissed or converted "for cause" under 11 U.S.C. section

1307(c). *See In re Molitor*, 76 F.3d 218, 220 (8th Cir. 1996). The court uses a "totality of the circumstances" test to determine whether or not bad faith exists.

Here, the circumstances were that Harker filed the chapter 13 petition two weeks after the issuance of a tax court decision unfavorable to him. He listed on the schedules the IRS as his only significant credior [sic]. He did not file his appeal of the tax court decision until after filing the bankruptcy petition. He did not file an appeal bond.

The bankruptcy court reasonably concluded from the totality of the circumstances that the debtor filed the chapter 13 petition as a "litigation tactic to avoid posting an appeal bond that would have been required to postpone assessment by the IRS pending appeal."

The appellant's appeal from the order of the bankruptcy court is denied. The court upholds the decision of the bankruptcy court.

IT IS SO ORDERED.

Dated this 6th day of September, 1996.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES
DISTRICT COURT

**APPENDIX C**

**United States Court of Appeals**

**FOR THE EIGHTH CIRCUIT**

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No. 96-3620

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| | | |
|---|---|---|
| Dennis Harker, Appellant, v. United States of America; Internal Revenue Service, Appellees. | * * * * * * * * * | Appeal from the United States District Court for the Southern District of Iowa. **[UNPUBLISHED]** |

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Submitted: April 7, 1997
Filed: April 25, 1997

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Before McMILLIAN, FAGG, and LOKEN, Circuit Judges.

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PER CURIAM.

In 1990, Dennis Harker pleaded guilty to tax evasion. The Internal Revenue Service (IRS) subsequently assessed substantial tax deficiencies which Harker contested. In May 1995, the Tax Court issued a decision finding Harker liable for tax deficiencies and penalties. Two weeks later, before Harker appealed that decision or the IRS commenced assessment and collection of the taxes, Harker filed this voluntary petition under Chapter 13 of the

Bankruptcy Code. He then appealed the Tax Court's decision without posting an appeal bond. We ultimately affirmed. *See Harker v. Commissioner*, 82 F.3d 806 (8th Cir. 1996). In this appeal, Harker challenges the district court's[1] affirmance of the bankruptcy court's[2] decision to dismiss the Chapter 13 petition (after Harker failed to convert it to a Chapter 7 proceeding) on the ground that Harker sought Chapter 13 relief in bad faith. We again affirm.

"[A] Chapter 13 petition filed in bad faith may be dismissed or converted 'for cause' under 11 U.S.C. § 1307(c)." *Molitor v. Eidson*, 76 F.3d 218, 220 (8th Cir. 1996). In this case, following a hearing, the bankruptcy court found that Harker filed his Chapter 13 petition "as a litigation tactic to avoid posting an appeal bond [that was otherwise necessary] to postpone assessment by the IRS"; that IRS is his only unsecured creditor; and that the debt to IRS is a potentially nondischargeable, priority claim. The court then made the ultimate finding that this use of Chapter 13 is inconsistent "with the fundamental goal to reorganize debts" and therefore warrants an order requiring conversion or dismissal under § 1307(c) for bad faith. After careful review of the record, we conclude that these findings are not clearly erroneous. *See Noreen v. Slattengren*, 974 F.2d 75, 77 (8th Cir. 1992); *In re Love*, 957 F.2d 1350, 1353 (7th Cir. 1992); *In re LeMaire*, 898 F.2d

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[1] The HONORABLE CHARLES R. WOLLE, Chief Judge of the United States District Court for the Southern District of Iowa.

[2] The HONORABLE RUSSELL J. HILL, United States Bankruptcy Judge for the Southern District of Iowa.

1346, 1349-50 (8th Cir. 1990) (en banc). Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

## APPENDIX D

## UNITED STATES COURT OF APPEALS

## FOR THE EIGHTH CIRCUIT

No. 96-3620SIDM

| | | |
|---|---|---|
| Dennis Harker, | * | |
| | * | |
| Appellant, | * | Appeal from the United |
| | * | States District Court for |
| vs. | * | the Southern District of |
| | * | Iowa. |
| United States of America; et al., | * | |
| | * | |
| Appellees. | * | |

The petition for rehearing filed by the appellant has been considered by the court and is denied.

June 20, 1997

Order Entered at the direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX E

**11 U.S.C. § 523. Exceptions to discharge.**

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(1) for a tax or a customs duty –

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required –

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

* * *

## APPENDIX F

**11 U.S.C. § 727. Discharge.**

(a) The court shall grant the debtor a discharge, unless –

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case –

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under sections 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under sections 1228 or 1328 of this title, or under sections 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least –

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

* * *

## APPENDIX G

**11 U.S.C. § 1328. Discharge.**

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –

(1) provided for under section 1322(b)(5) of this title;

(2) of the kind specified in paragraph (5), (8) or (9) of section 523(a) or 523(a)(9) [*sic*] of this title; or

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.

* * *

(2)

Supreme Court, U.S.
FILED
NOV 21 1997
CLERK

No. 97-516

# In the Supreme Court of the United States

OCTOBER TERM, 1997

DENNIS HARKER, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
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1288

## QUESTION PRESENTED

Whether this Chapter 13 bankruptcy case was properly dismissed because it was filed in bad faith.

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# In the Supreme Court of the United States

OCTOBER TERM, 1997

---

No. 97-516

DENNIS HARKER, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 12-14), the district court (Pet. App. 10-11) and the bankruptcy court (Pet. App. 1-9) are unpublished, but the decision of the court of appeals is noted at 112 F.3d 513 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on April 25, 1997. A petition for rehearing was denied on June 20, 1997 (Pet. App. 15). The petition for a writ of certiorari was filed on September 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1990, petitioner pleaded guilty to tax evasion. The Internal Revenue Service thereafter issued a notice of deficiency that determined substantial deficiencies in tax and additions to tax for petitioner (Pet. App. 2, 12). Petitoner sought review of those determinations in Tax Court. In May 1995, that court entered a decision finding petitioner liable for the deficiencies and additions to tax (*ibid.*).

Two weeks later, before filing a notice of appeal from the Tax Court decision, petitioner filed a petition for relief under Chapter 13 of the Bankruptcy Code (Pet. App. 2, 12-13). Upon the filing of that bankruptcy petition, the automatic stay imposed by 11 U.S.C. 362(a) prevented the taxes associated with the Tax Court proceedings from resulting in liens on petitioner's property. In addition, the automatic stay permitted petitioner to stay collection of the adjudicated tax debt pending appeal of the Tax Court decision without posting an appeal bond (Pet. App. 13).[1] See note 2, *infra*.

The bankruptcy trustee and the United States moved to dismiss the Chapter 13 petition because (i) petitioner's debts exceeded the maximum permitted for a Chapter 13 petition (11 U.S.C. 109(e)) and (ii) the petition was filed in bad faith (11 U.S.C. 1307(c)). After conducting a hearing, the bankruptcy court held that the particular facts of this case and the totality of the circumstances reflected that the Chapter 13 petition had not been filed in good faith (Pet. App. 7). The court concluded that petitioner had filed his bankruptcy petition as a litigation tactic to avoid

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[1] The decision of the Tax Court was subsequently affirmed. *Harker* v. *Commissioner*, 82 F.3d 806 (8th Cir. 1996).

posting an appeal bond from the Tax Court decision. The court noted that the United States was petitioner's only unsecured creditor and that petitioner's debt to the government was a potentially nondischargeable, priority claim (*id.* at 8, 13). The court concluded that petitioner's bad faith bankruptcy case should be dismissed under 11 U.S.C. 1307(c) or, if petitioner made a timely request, converted to a liquidation proceeding under Chapter 7 (Pet. App. 7-9). The court further stated that, because the Chapter 13 case was properly dismissed for bad faith, it was unnecessary to address the alternative question whether petitioner's debts exceeded the maximum permitted for a Chapter 13 case under 11 U.S.C. 109(e) (Pet. App. 8). When petitoner did not move to have the case converted to a Chapter 7 proceeding within the time permitted, the case was dismissed by the bankruptcy court.

2. The district court upheld the bankruptcy court's ruling (Pet. App. 10-11). On appeal to the Eighth Circuit, the court of appeals affirmed. The court of appeals concluded that the findings of the bankruptcy court were supported by the record and, in particular, that the court's finding that this bankruptcy case had been brought in bad faith was not clearly erroneous (*id.* at 13).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Section 1307(c) of the Bankruptcy Code, a bankruptcy court "may convert a case under [chapter 13] to a case under chapter 7 of this title, or may

dismiss a case under [chapter 13], whichever is in the best interests of creditors and the estate, for cause * * *." 11 U.S.C. 1307(c). A sufficient "cause" for dismissing a bankruptcy case is a lack of "good faith" in filing the petition. *In re Kestell*, 99 F.3d 146, 148 (4th Cir. 1996); *In re Lilley*, 91 F.3d 491, 496 (3d Cir. 1996); *In re Molitor*, 76 F.3d 218, 220 (8th Cir. 1996); *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994); *In re Gier*, 986 F.2d 1326, 1329-1330 (10th Cir. 1993); *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992). Whether the debtor lacked good faith in filing the Chapter 13 petition is a factual determination made "on a case-by-case basis in light of the totality of the circumstances." *In re Lilley*, 91 F.3d at 496. Accord *In re Molitor*, 76 F.3d at 220; *In re Eisen*, 14 F.3d at 470; *In re Gier*, 986 F.2d at 1329; *In re Love*, 957 F.2d at 1355, 1359. Applying this standard, the courts below properly concluded that petitioner's Chapter 13 bankruptcy petition was not filed in good faith.

After the Tax Court entered its decision sustaining the deficiencies determined by the Commissioner, it became possible for the Internal Revenue Service to take action to assess and collect the unpaid liabilities unless an appeal bond was posted by petitioner.[2] Petitioner did not, however, post the required bond.

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[2] Under Section 6213(a) of the Internal Revenue Code, if a Tax Court petition is filed after the issuance of a notice of deficiency, no assessment or collection of the deficiency shall be made "until the decision of the Tax Court has become final." 26 U.S.C. 6213(a). A Tax Court decision is generally not "final" for this purpose until 90 days after it is entered or the completion of any further judicial review. 26 U.S.C. 7481. The Code further provides, however, that appellate review "shall not operate as a stay of assessment or collection" unless an appropriate appeal bond has been filed. 26 U.S.C. 7485.

Instead, shortly after the Tax Court decision was entered, petitioner filed a Chapter 13 bankruptcy petition and thereby invoked the automatic stay under 11 U.S.C. 362(a). That action provided him substantially the same protection against tax collection that an appeal bond would have provided (Pet. App. 12-13). Since the United States was his only unsecured creditor, the bankruptcy filing had no material consequence other than permitting the appeal of his tax case to proceed without the necessity for posting a bond (*id.* at 13). The courts below correctly concluded that the Chapter 13 bankruptcy case was not brought in good faith, for it served only as "a litigation tactic to avoid posting an appeal bond" (*ibid.*).[3]

The dismissal of this Chapter 13 case for bad faith rests upon factual determinations concurred in by all three courts below. Further review of these factual determinations is not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

2. Petitioner errs in contending (Pet. 8-9) that the decision in this case conflicts with the decision of the Third Circuit in *In re Lilley*, 91 F.3d 491, 495 (1996),

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[3] The schedules filed with petitioner's bankruptcy petition further demonstrate that he was unconcerned with eligibility for Chapter 13 relief when he filed his petition. Those schedules state that petitioner had fixed and liquidated unsecured debts in excess of $250,000 and thus showed on their face that petitioner did not quality for relief under Chapter 13 (Pet. App. 3). See 11 U.S.C. 109(e). The failure of petitioner to satisfy the eligibility requirements of 11 U.S.C. 109(e) provides an alternative basis for dismissal of the Chapter 13 petition in this case. See *United States* v. *Verdunn*, 89 F.3d 799 (11th Cir. 1996); *In re Knight*, 55 F.3d 231 (7th Cir. 1995).

and the decision of the Seventh Circuit in *In re Love*, 957 F.2d 1350 (1992). Petitioner states that these decisions reflect the general rule that a "fact intensive inquiry [is required] to support a dismissal of a chapter 13 petition for bad faith, and the burden is on the creditor to develop those facts as a matter of record" (Pet. 8). Nothing in the decision in the present case is inconsistent with that proposition. Indeed, in reviewing the factual determinations of the courts below, the court of appeals cited *In re Love* with approval (Pet. App. 13).

The court of appeals reviewed the entire factual record of this case. As petitioner notes (Pet. 5-6), that record consists of four exhibits and offers of proof made by petitioner's counsel at the bankruptcy court hearing. Based upon a review of this record, the court of appeals concluded that the finding of bad faith made by the bankruptcy court was not clearly erroneous (Pet. App. 13). Petitioner is simply incorrect in contending that the court of appeals made "its decision with no inquiry whatsoever on the record" (Pet. 8).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1997